IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 19-0298

PATRICK MORRISEY, in his official capacity
as West Virginia Attorney General, and the
STATE OF WEST VIRGINIA,

Defendants below, Petitioners,

v.

WEST VIRGINIA AFL-CIO, et al.

Plaintiffs below, Respondents.

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

I. The circuit court erred in concluding that the Workplace Freedom Act infringes, violates, or abrogates the right of free association.

II. The circuit court erred in concluding that the Workplace Freedom Act infringes, violates, or abrogates the prohibition on takings without due process and just compensation.

III. The circuit court erred in concluding that the Workplace Freedom Act infringes, violates, or abrogates the prohibition against arbitrary restraints on liberty.

IV. The circuit court erred in not giving sufficient weight to the comprehensive scheme governing labor relations under federal law, including an express reservation to the States protecting their ability to enact right-to-work statutes.

STATEMENT OF THE CASE

Two years ago, this Court dissolved a preliminary injunction enjoining enforcement of the same statute at the heart of this case—the Workplace Freedom Act, West Virginia Code § 21-5G-1 *et seq.* ("the Act")—because Respondents "failed to show a likelihood of success in their legal challenge to the [Act's] constitutionality." *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 637, 804 S.E.2d 883, 887 (2017). Even though over two dozen States have right-to-work laws like the Act, Respondents could not advance "any federal or state appellate court that, in over seven decades, has struck down such a law"—and this Court found no other basis on which Respondents were likely to prevail, either. *Id.* In fact, one member of this Court characterized the majority's published decision as "so completely resolv[ing] the underlying constitutional issues" that remand was "nothing but a perfunctory exercise." *Id.* at 646, 804 S.E.2d at 896 (Workman, J., concurring in part and dissenting in part).

Respondents did not amend their complaint, develop new evidence, or advance any new legal theories after this Court's decision. There was likewise no new briefing on remand, and the circuit court did not conduct another hearing on Respondents' constitutional claims. Despite this unchanged record, however, the circuit court enjoined vital portions of the Act *again*—this time permanently—in a decision that all-but ignores this Court's decision. Reversal is warranted on this basis alone. Further, even if the circuit court had been writing on a blank slate instead of striking out this Court's prior holding, the reality is that the theories Respondents advanced two years ago have not improved with age. If anything, recent legal developments confirm the wisdom of the Court's initial decision. Kentucky has joined the growing number of States that have enacted laws like the Act, and last year its high court rejected a challenge very similar to Respondents' here. *See generally Zuckerman v. Bevin*, 565 S.W.3d 580 (Ky. 2018). In the public-sector union context, the Supreme Court of the United States explained that laws shielding employees from compulsory union fees *protect* important associational freedoms. *Janus v. Am. Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). And despite predictions to the contrary, recent empirical studies show that public-sector union membership has increased since that decision came down.

This Court should finish what it started two years ago by reversing the circuit court again, and making clear that the Act is constitutional.

I. Legal Background

A. Both federal and West Virginia law provide that employees have the right to "bargain collectively through representatives of their own choosing." 29 U.S.C. § 157; *see* W. Va. Code § 21-1A-3. For over 80 years, federal law has provided a detailed and balanced regulatory framework building out this right. It protects unions' ability to operate and advocate for employees

on the one hand, while making them subject, on the other hand, to certain terms and conditions designed to respect the rights of employees and employers during union elections and labor negotiations.

When seeking to represent a group of employees, unions may choose to organize as either an exclusive agency union or a members-only union. That choice bears certain costs and benefits.

Unions that take the former approach gain the valuable right to act as the exclusive agent of the employee unit when negotiating with management. To form such an exclusive agency union, a "majority of employees" in a bargaining unit must designate a union as a representative. 29 U.S.C. § 159(a); W. Va. Code § 21-1A-5(a). A union's decision to stand for election as an exclusive agent, rather than operate as a members-only union, is voluntary. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Ky. W. Va. Gas Co., LLC*, 795 F. Supp. 2d 596, 600 (E.D. Ky. 2011) (citations omitted). And even after election, a union may stop acting as exclusive representative at any time "by unequivocally and in good faith disclaiming further interest in representing the unit." *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980).

Federal law confers a weighty "set of powers and benefits" on these exclusive agency unions. *Int'l Ass'n of Machinists Dist. 10 & Its Local Lodge 1061 v. State*, 903 N.W.2d 141, 146 (Wis. 2017) (citing *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944)). An exclusive agency union acts as the sole representative of employees in the unit—whether members or nonmembers—"in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). And federal law requires employers to bargain in good faith with an exclusive agency union. *Id.* § 158(a)(5); *see also id.* § 158(b)(3) (requiring exclusive agency unions to negotiate in good faith with employers).

These federally created powers "result[] in a tremendous increase in the power of the representative of the group—the union." *Am. Commc'n Ass'n v. Douds*, 339 U.S. 382, 401 (1950). An exclusive agency union wields authority "comparable to th[at] possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele*, 323 U.S. at 202 (citation omitted). That power extends even to the ability to set the terms and conditions of employment of workers within the bargaining unit who opt *not* to become union members. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1955).

These benefits, however, also carry costs. Because federal law provides enormous power for unions to act on behalf of the employees they represent, it also imposes a statutory duty to represent all employees fairly—even nonmembers. *See, e.g.*, *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 761 (1961); *Vaca v. Sipes*, 386 U.S. 171, 181-82 (1967). The Supreme Court of the United States has explained that if the law conferred the power of exclusive representation "without any commensurate statutory duty toward its members," then "constitutional questions [would] arise." *Steele*, 323 U.S. at 198. Since the dawn of federal labor law, then, exclusive agency unions have accepted the duty of fair representation as a statutory responsibility in exchange for the benefits that flow from exclusive representation.

A union that wishes to forgo these costs—and the corresponding benefits—can decide instead that it wishes to represent only union members. "Members only" contract terms "have long been recognized." *Retail Clerks Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17, 29 (1962). Under this system a union can represent and bargain on behalf of its members, but not any nonmembers who are part of the same employee unit.

B. Federal law also reserves to the States the power to prohibit labor contracts that require employees to be members of exclusive agency unions on pain of losing their jobs. Although

employers may generally enter into "an agreement with a labor organization . . . to require as a condition of employment membership therein," 29 U.S.C. § 158(a)(3), federal law also makes clear that agreements like these may be "prohibited by State . . . law," *id.* § 164(b). In other words, federal law permits private "agency-shop arrangements," but States have power to "ban" them within their borders. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 190 n.3 (2007).

This reserved power allows States the discretion not only to prohibit contracts requiring employees to *join* an exclusive agency union, but those that require employees to *subsidize* them as well. As used in 29 U.S.C. § 158(a)(3), the idea of "membership" "as a condition of employment"—the language permitting agency-shop arrangements—has been "whittled down to its financial core." *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). This "financial core" includes payments "germane to collective bargaining, contract administration, and grievance adjustment." *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988). The Court has also recognized that the term "membership" has the same meaning under 29 U.S.C. § 164(b), which authorizes States to forbid agency-shop arrangements through right-to-work laws. *See Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 751 (1963).

The legislative history of the 1947 Taft-Hartley Act, which clarified the reserved authority of the States to ban compulsory union membership, confirms this broad understanding of "membership" to include all compulsory agency fees. At the time, several States already had right-to-work laws that prohibited compulsory fees. *Sweeney v. Pence*, 767 F.3d 654, 662 (7th Cir. 2014). "The House report listed each state which had passed a right-to-work law or constitutional provision" that Taft-Hartley was intended to affirm. *Int'l Union of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus. of the U.S. and Canada, Locals Unions Nos. 141, 229, 681 and 706 v. NLRB*, 675 F.2d 1257, 1260 (D.C. Cir. 1982) (citing H. R. Rep. No.

245, 80th Cong., 1st Sess. 34, *reprinted at* I Legislative History of the Labor Management Relations Act of 1947, 324 (1948)). Congress was "well aware" that 7 of those 12 state laws included explicit bans on compulsory agency fees, and "the stated purpose of [29 U.S.C. § 164(b)] was to preserve the efficacy of laws like these—statutes that allowed states to place restrictions of their choosing on union-security agreements, including restrictions on whether employees could be compelled to pay dues or fees of *any kind* to a union." *Sweeney*, 767 F.3d at 663 (emphasis added).

Thus, "a union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Harris v. Quinn*, 573 U.S. 616, 649 (2014). Under federal law, States can decide whether to allow employers and unions to negotiate for provisions that would compel nonmember employees to pay agency fees. When unions adopt an exclusive agency model, they do so knowing that federal law requires as a nonwaivable condition of exclusive agency that they represent both members and nonmembers fairly, *and* that certain States may limit their ability to collect fees from nonmembers.

C. In 2018—after this Court reversed the circuit court's preliminary injunction—the Supreme Court of the United States decided *Janus*. In *Janus*, the Court affirmed the right of public-sector employees to refuse to pay agency fees. Specifically, the Court overruled four-plus decades of precedent to hold that unions and public employers may not force nonmembers to pay agency fees. *Janus*, 138 S. Ct. at 2465-78. *Janus* was limited on its facts to the public-sector union context, but its rationale has broader implications: The Court explained that forcing employees to pay agency fees constitutes constitutionally impermissible compelled speech, *id.* at 2463-65, and rejected the argument that the ability to collect agency fees is necessary for an

exclusive agency union to be able to fulfill its legal obligation to fairly represent nonmembers, *id.* at 2467.

II. The Workplace Freedom Act

Joining 27 other States that had enacted right-to-work laws, the West Virginia Legislature passed Senate Bill 1, now codified at West Virginia Code §§ 21-1A-3, 21-1A-4 and 21-5G-1 to -7, on February 5, 2016. After Governor Tomblin vetoed the Act, the Legislature overrode the veto on February 12, 2016. The Act applies only to agreements entered into, modified, renewed, or extended after July 1, 2016. *See* W. Va. Code § 21-5G-7(b).

Creating a new article of the West Virginia Code titled the West Virginia Workplace Freedom Act—West Virginia Code Chapter 21, Article 5G—the Act's key provision provides that a person may not be required to "[b]ecome or remain a member of a labor organization; [p]ay any dues, fees, assessments or other similar charges, however denominated, of any kind or amount to any labor organization; or [p]ay any charity or third party, in lieu of those payments, any amount that is equivalent to a *pro rata* portion of dues, fees, assessments or other charges required of members of a labor organization." W. Va. Code § 21-5G-2. The Act also bars "[a]ny agreement, understanding or practice . . . between any labor organization and an employer . . . which provides for the exclusion from employment of any person because of membership in, affiliation with, resignation from or refusal to join or affiliate with any labor organization," and provides both civil and criminal penalties for noncompliance. W. Va. Code §§ 21-5G-3, 4, 5.

The Act also amended the preexisting Labor-Management Relations Act for the Private Sector to provide similar protections for a right not to pay compulsory union fees. *See* W. Va. Code § 21-1A-3. These amendments also make it an unfair labor practice for a labor organization

to interfere with the exercise of this right. W. Va. Code § 21-1A-4(b)(1). A violation of these protections may be enforced through a civil suit. W. Va. Code § 21-1A-7(b).

These provisions of the Act track similar provisions in most right-to-work laws across the country.[1]

In 2017, the Legislature amended the Act to eliminate the statute's definition of the word "State" and to remove a provision relating to the Act's application to the construction and building industries.[2] As the circuit court recognized, A.R. 67-68, this amendment rendered moot part of Respondents' claims below.

III. Procedural Background

A. Respondents—plaintiffs below, including several organized labor organizations—filed a complaint challenging the Act four days before its July 1, 2016 effective date. A.R. 752. Respondents named as defendants the State of West Virginia, the Governor, and the Kanawha County Prosecuting Attorney, who was later dismissed as a defendant. A.R. 710. Along with their complaint, Respondents filed a motion for a preliminary injunction. A.R. 728. Respondents claimed that the Act infringes on their liberty and freedom of association and takes property without just compensation in violation of the West Virginia Constitution. The Attorney General

[1] *See* Ala. Code § 25-7-34; Ark. Code § 11-3-303; Ga. Code § 34-6-22; Idaho Code § 44-2003; Indiana Code § 22-6-6-8; Iowa Code § 731.4; Ky. Rev. Stat. § 336.130(3); 23 La. Rev. Stat. § 983; Mich. Comp. Laws § 423.14; Miss. Code § 71-1-47(d); Neb. Rev. Stat. § 48-217; N.C. Gen. Stat. §§ 95-81–95-82; Okla. Const. art. 23, § 1A(B); S.C. Code § 41-7-30; Tenn. Code § 50-1-203; Tex. Labor Code § 101.111; Utah Code § 34-34-10; Va. Code § 40.1-62; Wis. Stat. § 111.04(3)(a); Wyo. Stat. § 27-7-111; *see also* Ariz. Const. art. XXV; Fla. Const. art. I, § 6; Kan. Const. art. 15, § 12; Nev. Rev. Stat. § 613.130; N.D. Cent. Code § 34.01.14; S.D. Const. art. VI, § 2; Va. Code § 40.1-58 *et seq*. Missouri also had a right-to-work law, but it has since been repealed. *See* Scott Neuman, *Missouri Blocks Right-To-Work Law*, NPR (Aug. 8, 2018), *available at* https://www.npr.org/2018/08/08/636568530/missouri-blocks-right-to-work-law.

[2] *See* 2017 W. Va. Acts 1211.

intervened on behalf of the State of West Virginia (collectively, "the State") and opposed the motion for a preliminary injunction.

At the preliminary injunction hearing on August 10, 2016, Respondents presented a single witness: Ken Hall, president of Teamsters Local 175 and General Secretary of the International Brotherhood of Teamsters. He produced no empirical evidence that the Act would cause Respondents any cognizable harm. Instead, Hall testified that he had instructed the bookkeeper of Teamsters Local 175 to prepare a document showing that the Act could theoretically cause loss of revenue because of a decrease in union membership of up to 20 percent. A.R. 546-47. But Hall conceded that he merely borrowed that number from a report that a third party prepared for the Legislature as part of its consideration of the Act. He did not independently corroborate it or otherwise explain how its projections applied to these specific Respondents. A.R. 586-87. Hall further testified that Respondents "have some" collective bargaining agreements "that are in the process of being renegotiated or have just been renegotiated," but he provided no other evidence of collective bargaining agreements that the Act might cover. A.R. 593.

After the close of testimony the circuit court announced its intention to issue an injunction that would apply statewide and delay the effective date of the Act, but it did not issue an order for several months. Meanwhile, the parties filed and briefed cross-motions for summary judgment, and the circuit court heard argument on the cross-motions on December 2, 2016. A.R. 534. After the State informed the circuit court that it intended to petition for an extraordinary writ in this Court if it failed to rule on the still-pending preliminary injunction motion, A.R. 530, the circuit court issued an order granting Respondents a preliminary injunction on February 23, 2017. A.R 513. The circuit court later issued a superseding and final preliminary injunction. A.R. 498; *see*

also W. Va. AFL-CIO v. Tomblin, 2017 WL 2304492 (W. Va. Cir. Ct. Feb. 24, 2017). The State appealed that order to this Court.

B. This Court reversed the circuit court's order granting the preliminary injunction on September 15, 2017. *Morrisey*, 239 W. Va. 633, 804 S.E.2d 883. Focusing primarily on the standard relevant to a preliminary injunction—whether Respondents were likely to succeed on the merits of their lawsuit—the Court held that they were unlikely to succeed on any of their claims.

First, this Court rejected Respondents' argument that the Act infringes on their ability to freely associate with members and nonmembers. The Court explained that "nothing in [the Act] prevents a person from making a voluntary choice to associate with a union or to pay union dues." *Morrisey*, 239 W. Va. at 640, 804 S.E.2d at 890. The Court also emphasized that Respondents' associational freedom argument was "nearly identical to one rejected by the Supreme Court almost seven decades ago." *Id.*

Second, this Court rejected Respondents' argument that the Act constitutes a taking without just compensation to the extent that it would require unions to expend funds to represent nonmembers. The Court determined that the Act did "not affect existing contracts" because it applied prospectively and because Respondents do not have a constitutionally protected property interest in a unilateral *expectation* of agency fees; thus, Respondents "have no protected property right that the Legislature has taken through the adoption of [the Act]." *Morrisey*, 239 W. Va. at 642, 804 S.E.2d at 892.

Third, the Court held Respondents did not establish that the Act infringes on any protected liberty interests in not conducting work on behalf of nonmembers. The Court explained that Respondents "failed to show that any other appellate court in this country has adopted a similar

argument to strike down a similar right to work law." *Morrisey*, 239 W. Va. at 642, 804 S.E.2d at 892.

For all these reasons, this Court readily concluded that Respondents did not meet their burden to rebut the "fundamental rule of construction" "that courts must presume a law is constitutional unless a party proves, beyond a reasonable doubt, that the law violates the Constitution." *Morrisey*, 239 W. Va. at 638, 804 S.E.2d at 888 (citation omitted). Because Respondents failed to show "a likelihood of success on the merits," this Court reversed the circuit court's order granting Respondents' motion for a preliminary injunction. *Id.* at 642, 804 S.E.2d at 892. The court remanded the case to the circuit court to resolve the parties' cross-motions for summary judgment and, given the Act's "potentially substantial impact upon public interests," "encourage[d] the circuit court to act with greater celerity in bringing this case to a resolution." *Id.* at 642 & n.36, 804 S.E.2d at 892 & n.36; *see also id.* at 645, 804 S.E.2d at 895 (Loughry, C.J., concurring) ("I . . . encourage the circuit court to assiduously avoid further delay and grant this matter its foremost attention."); *id.* at 647, 804 S.E.2d at 897 (Workman, J., concurring in part and dissenting in part) ("[C]ertainly it is troubling that this matter has been ripe for decision by the circuit court since December of 2016.").

C. On remand, the parties informed the circuit court that additional briefing and a second hearing on the cross-motions for summary judgment were unnecessary. *See, e.g.*, A.R. 76. Yet despite this Court's clear signal that Respondents' arguments lacked merit—in Justice Workman's words, the Court's opinion left remand a "perfunctory exercise," *Morrisey*, 239 W. Va. at 646, 804 S.E.2d at 896 (Workman, J., concurring in part and dissenting in part)—the circuit court waited 17 months to resolve the pending cross-motions. As with the preliminary-injunction order, the State ultimately informed the circuit court that it would seek an extraordinary writ from this Court if the

circuit court did not decide the motions. A.R. 73. The circuit court issued its order soon after on February 27, 2019. A.R. 72.

Ignoring the clear implications of this Court's 2017 opinion, the circuit court again declared portions of the Act unconstitutional and enjoined its enforcement. A.R. 27. First, relying on Civil Rights era cases addressing dissimilar statutes, A.R. 40-42, the circuit court found that the Act violates Respondents' associational rights by discouraging employees from joining or remaining members of unions. *See* A.R. 40-47. Second, the court held that the Act constitutes a taking of Respondents' property without due process and just compensation. The circuit court ignored this Court's holding when reversing the preliminary injunction that a unilateral expectation of future agency fees does not constitute "property" for purposes of the Takings Clause in the West Virginia Constitution, and found that the substantial benefits exclusive agency unions receive under federal law constituted compensation for any "taking" that may occur. *See* A.R. 47-49. Finally, the circuit court applied *Lochner*-era reasoning to hold that the Act infringes on Respondents' liberty interests, and that the Legislature could not have had a non-arbitrary and rational reason to enact it. *See* A.R. 50-51.

The circuit court originally stayed its order for 30 days. A.R. 72. The State moved for an extension of that stay pending resolution of this appeal, A.R. 23, but the circuit court denied that motion, A.R. 19. Petitioners then moved this Court for a stay of the circuit court's order. A.R. 13. On March 29, 2019, this Court granted the motion and stayed the circuit court's order pending final disposition of the case in this Court. A.R. 6.

SUMMARY OF ARGUMENT

The decision below is an extreme outlier—every appellate court in the country to consider the issue has held that right-to-work laws adhere to federal and state law. This Court held two

years ago that Respondents were unlikely to succeed on the merits of any of their constitutional claims. Even though nothing has changed in Respondents' favor in the interim, the circuit court ignored this Court's direction and repeated the flawed analysis from its preliminary-injunction order to permanently enjoin the Act. Federal and state law require reversal.

I. The circuit court erred in finding that the Act infringes on the right to associational freedom. A union's decision to represent nonmembers is a voluntary choice that federal labor law has afforded unions since the 1930s. Under that federal framework—which Respondents do not challenge—unions may represent either their members only, or all employees within a particular bargaining unit, including nonmembers. *See* 29 U.S.C. § 159(a); W. Va. Code § 21-1A-5(a); *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014). Each option comes with specific costs and benefits that unions weigh when determining how to organize. One of these potential costs flows from the fact that federal law authorizes States to enact laws—like the Act—that prohibit agreements requiring union membership or forcing nonmembers to pay union fees. 29 U.S.C. § 164(b). Any duty to associate with nonmembers thus comes from unions' own choices under federal law, not the Act. Federal and state law is also clear that the Act does not impermissibly interfere with unions' ability to recruit or retain members. And far from restricting employees' right to choose to join or not join a union, the Act recognizes employees' important interests in not being forced to associate with a union in the form of paying compulsory agency fees.

II. The circuit court's conclusion that the Act is an unlawful taking fares no better. The only interest Respondents advance is an expectation in future agency fees under contracts that Respondents may or may not have negotiated with employers after the Act's effective date. This Court has already held that this interest is not cognizable under the Takings Clause of the West Virginia Constitution because it is a speculative and unilateral contract-based interest. *Morrisey*,

239 W. Va. at 641, 804 S.E.2d at 891. Further, the circuit court wrongly concluded that the challenged law forces Respondents to provide uncompensated services to nonmembers, because unions are free to organize as members-only unions under federal law, the remedy from any "taking" from unions' choice to organize as exclusive agency unions should come from the federal government; and unions that choose exclusivity are compensated by the substantive benefits that status provides.

III. The circuit court also incorrectly found that the Act violates Respondents' liberty interests. The court's legal analysis uses an outmoded due-process framework that this Court has substantively rejected, and relies on cases involving extreme statutes very different from the Act. Viewed under the correct standard, there are multiple rational, non-arbitrary reasons justifying the Legislature's policy decision to pass the Act—including a desire to protect employees from compulsory association, promote workplace harmony, and encourage economic growth.

IV. Finally, the circuit court did not give adequate weight to the comprehensive, federal-law scheme governing labor relations, which expressly provides that States retain the ability to enact right-to-work statutes. The circuit court's state-law analysis, which erases that choice in the State of West Virginia, creates significant tension with federal law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Unless this Court summarily reverses the decision below based on this Court's 2017 decision invalidating the circuit court's preliminary-injunction order, the State requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20 because the Workplace Freedom Act involves matters of fundamental public importance in this State.

STANDARD OF REVIEW

This Court reviews *de novo* a circuit court's decision on the constitutionality of a statute. Syl. pt. 1, *State v. Rutherford*, 223 W.Va. 1, 672 S.E.2d 137 (2008); *see also* Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review.").

ARGUMENT

There was nothing tentative about this Court's 2017 decision dissolving the circuit court's preliminary injunction. Emphasizing that dozens of States "have a right to work law, yet the unions have not directed us to any federal or state appellate court that, in over seven decades, has struck down such a law," *Morrisey*, 239 W. Va. at 637, 804 S.E.2d at 887, the Court found no likelihood of success on the merits on *any* of Respondents' claims. The Court left no doubt about the ultimate resolution of this case, to the point that its analysis "so completely resolve[d] the underlying constitutional issues" that remand should have been "a perfunctory exercise." *Id.* at 646, 804 S.E.2d at 896 (Workman, J., concurring in part and dissenting in part).

The circuit court's extraordinary decision to ignore this prior opinion and enjoin the Act anew—now permanently—cannot stand under either federal or state law. There have been no factual or legal developments supporting the circuit court's order, and indeed the only relevant developments support this Court's initial conclusion. Since this Court's last decision, for example, Kentucky joined the growing chorus of States in adopting a right-to-work law like West Virginia's, and that law's constitutionality was fully litigated while the circuit court waited to act on the parties' cross-motions for summary judgment. *See Zuckerman*, 565 S.W.3d 580. Further, the circuit court not only gave remarkably little attention on remand to this Court's reasoning, but ignored the need for "due restraint" when reviewing a validly enacted statute, Syl. pt. 4, *State v.*

James, 227 W. Va. 407, 710 S.E.2d 98 (2011) (citation omitted); elided the principle that state laws are presumed to be constitutional, Syl. pt. 6, *Gibson v. W. Va. Dep't. of Hwys.*, 185 W.Va. 214, 406 S.E.2d 440 (1991); and ran roughshod over the rule that "any doubt" in constitutional challenges "must be resolved in favor of the [statute's] constitutionality," Syl. pt. 3, *James*, 227 W. Va. 407, 710 S.E.2d 98 (citation omitted). The Court should reverse.

I. The Act Does Not Infringe Respondents' Associational Rights.

The circuit court erred in holding that the Act infringes on Respondents' freedom to associate. The West Virginia Constitution provides that "[t]he right of the people . . . to consult for the common good . . . shall be held inviolate." W. Va. Const. art. III, § 16. Moreover, this Court has held that Article III, § 7 of the Constitution protects the right to associate, as well. *See Pushinsky v. W. Va. Bd. of Law Examiners*, 164 W. Va. 736, 748-49, 266 S.E.2d 444, 451 (1980). The Act violates neither of these constitutional provisions. As this Court has already recognized, there is "nothing" in the Act "that prevents a person from making a voluntary choice to associate with a union or to pay union dues." *Morrisey*, 239 W. Va. at 640, 804 S.E.2d at 890. The circuit court rejected this plain reading of the Act to find, instead, that Respondents' right to associate is infringed because employees may be less likely to choose to join a union if their job does not depend on membership or paying an agency fee. A.R. 44-45. Yet the notion that the Act infringes Respondents' right to organize by removing their ability to force *nonconsenting* employees to pay fees turns the right of voluntary association on its head.

A. First, to the extent that Respondents claim that they are less effective because they must represent nonmembers under the Act, this position suffers from the erroneous premise that *the Act* requires this result. As discussed above, the Act does not demand anything from unions. It is federal law—and Respondents' voluntary choices under that framework to claim the benefits of organizing as exclusive agency unions—that imposes the duty to represent nonmembers.

Respondents do not challenge that federal regime here, nor the longstanding provision in federal labor law expressly permitting state right-to-work statutes like West Virginia's, 29 U.S.C. § 164(b). Indeed, fair representation is simply one of the costs of an exclusive agency arrangement under federal law. *Zoeller*, 19 N.E.3d at 753. The Act does not limit Respondents' freedom to choose to associate as a members-only union instead. To be sure, if they choose this approach they would forgo the benefits that flow from exclusive representation, but they would also be free of any duty to work on behalf of employees who exercise *their* choice not to join a union or pay union fees.

The circuit court dismissed this position because it concluded that there is no true choice to be an exclusive agency union or a members-only union. A.R. 51-54. Adopting Respondents' argument, the circuit court held that no rational union would decline the benefits that federal law affords to an exclusive agency union. The Supreme Court of the United States, however, disagrees with the circuit court's view of federal labor law. In *Janus*, the Court squarely held that "[n]o union is ever compelled to seek [exclusive agency designation]." 138 S. Ct. at 2467. In other words, unions have a real choice between organizing as an exclusive agency union and organizing as a members-only union. The benefits exclusive bargaining status confers may be strong incentives to choose to organize in that way, but they do not make the corresponding burdens in States with right-to-work laws coercive.

B. The circuit court also wrongly equated the Act's prohibition on compelled agency fees with prohibited burdens on "the ability to recruit and retain members"—like forced disclosure of membership lists during the Civil Rights era. A.R. 40. This Court has already recognized Respondents' claim that eliminating the ability to force nonconsenting employees to pay for union activities violates their associational rights for what it is: An argument "nearly identical to one

rejected by the United States Supreme Court almost seven decades ago." *Morrisey*, 239 W. Va. at 640, 804 S.E.2d at 890. The argument has not fared better over time; it conflicts with at least two lines of precedent delineating the right to free association.

First, the Supreme Court has rejected the notion that the First Amendment entitles unions to compel nonmembers to participate in union activities, including payment of mandatory fees. In *Lincoln Federal Labor Union No. 19129, American Federation of Labor v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), unions challenged right-to-work laws passed in North Carolina and Nebraska. The unions argued that the statutes interfered with their rights to speak, assemble, and petition. The Court "deem[ed] it unnecessary to elaborate [on] the numerous reasons" this argument failed, and instead reasoned simply that these rights "cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans." *Id.* at 531. The Court further explained that "[t]here cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not . . . participate in union assemblies." *Id.* Critically, the Court rejected the unions' claims despite their assertions that the contracts banned there were "a *useful incentive to the growth of union membership*." *Id.* at 532 (emphasis added).

The circuit court erred in adopting that rejected argument here. A.R. 44-45. The circuit court minimized *Lincoln Federal* because it addressed the legality of "union shops,"[3] and not a ban on agency fees, A.R. 46, but that distinction is both factually incorrect and legally irrelevant. Although it was not the primary focus of the case, the North Carolina law at issue included an

[3] "Union shops" are "[s]hops that refuse to employ any but union members." *Lincoln Fed.*, 335 U.S. at 528 n.2.

explicit ban on agency fees. *See* 1947 N.C. Session Laws, ch. 328, § 5. More importantly, *Lincoln Federal*'s rationale controls in the union shop and agency fees contexts. In *Lincoln Federal*, the Supreme Court held that it violates employees' associational rights to require compelled "participat[ion] in union assemblies" as a condition of employment. 335 U.S. at 531. And the Supreme Court has more recently recognized that payment of agency fees is a form of participation in—and thereby association with—a union.

In 2007, the Court cited *Lincoln Federal* for the proposition that "unions have no constitutional entitlement to the *fees* of nonmember-employees." *Davenport*, 551 U.S. at 185 (citing *Lincoln Fed.*, 335 U.S. at 529-31; emphasis added). The circuit court dismissed this holding because *Davenport* involved fees collected from nonmembers and used for election-related purposes, reasoning that *Davenport* did not overturn the holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), regarding the propriety of *other* union fees for public-sector employees. *See* A.R. 57-58. *Janus*, however, did overturn this holding. 138 S. Ct. at 2465-78. The circuit court acknowledged as much, A.R. 58 n.24, yet refused to account for the added weight *Davenport* carries in a post-*Janus* world. Similarly, the circuit court's approach to *Davenport* ignores *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298 (2012), which quoted *Davenport* when referring to agency fees—the same fees at issue here. *See id.* at 313. Indeed, as a precursor to *Janus*, *Knox* held that "compulsory fees" collected by a public employee union "constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights." *Id.* at 310 (quotation marks and citation omitted).

Finally, the Seventh Circuit adopted this same reasoning to conclude that *Lincoln Federal* foreclosed an associational-right challenge to Indiana's ban on agency fees. *See Sweeney*, 767 F.3d at 670; *see also Int'l Ass'n of Machinists Dist. 10 & Its Local Lodge 1061 v. State*, 903

N.W.2d 141, 149 (Wis. App. 2017) (citing *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014)). The circuit court focused on *Sweeney*'s dissent instead of its holding, A.R. 38, 61, which is telling: This Court found no likelihood of success in the face of no "state or federal appellate decision accepting [Respondents'] constitutional freedom of association argument." *Morrisey*, 239 W. Va. at 641, 804 S.E.2d at 891. There is still no majority opinion by a state or federal appellate court that embraces the circuit court's approach, and no reason for this Court to issue the first.

Second, the circuit court failed to meaningfully consider a second line of precedent foreclosing the idea that a statute potentially making it harder to recruit members violates a union's associational rights. A "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983). Neither does the federal Constitution "confer an entitlement to such funds as may be necessary to realize all the advantages" of associational rights. *Id*. (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1983)). Accordingly, the Supreme Court and many others, including the Fourth Circuit, have upheld government policies that purportedly "'impair[ed]' or undermine[d] . . . the effectiveness of [a] union." *Smith v. Ark. State Hwy. Emp. Local 1315*, 441 U.S. 463, 465-66 (1979); *see also S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) ("Loss of payroll deductions . . . may tend to impair the effectiveness of [unions], but . . . such impairment . . . is not one that the First Amendment proscribes."); *Ark. State Hwy. Emp., Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980) (same). This Court should reject Respondents' claims for the same reason.

Rather than grapple with this precedent, the circuit court relied heavily on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and its progeny. A.R. 40-42. This reliance is

misplaced. In *NAACP*, Alabama sought to force the NAACP to disclose the names and home addresses of every member of the organization. The Supreme Court struck down that regime, reasoning that forced disclosure could place individual NAACP members in danger of reprisal because of their membership in the organization. *See NAACP*, 357 U.S. at 462-63. This serious threat would very likely have had a chilling effect on individuals' willingness to join the NAACP and led to individuals resigning their membership out of concern for their safety. *Id.* Here, nothing blocks employees from joining a union. The union may have to work harder to win members when they lack authority to force employees to pay agency fees, but there is a wide gulf between a law potentially making union membership less *attractive*, and one making it *dangerous* to join.

Moreover, *NAACP* and its progeny turned on "the vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462; *see also Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963). The Act does not alter union members' privacy rights in any way. The Supreme Court has also rejected the argument the circuit court adopted here—that an organization has an associational right independent of the individual rights afforded to its members. *See NAACP*, 357 U.S. at 458-59 (rejecting attempt by the NAACP to assert a right on its own behalf and explaining that the NAACP "argue[d] more appropriately the rights of its members"). Respondents cannot credibly argue that the Act limits their members' voluntary right to associate—or not—with a union.

The cases the circuit court relied on in the union context, *see* A.R. 43, likewise fall flat. In *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), a splintered Supreme Court held that a county could not bar a union from peacefully assembling or distributing information. That case has little weight here where the Act does not limit unions' ability to meet, recruit, or educate employees. Further, the *Hague* plurality relied heavily on the purpose enshrined in the

National Labor Relation Act ("NLRA") to promote collective bargaining and freedom of association in the labor context. *See id.* at 513 (Butler, J., announcing the judgment of the Court). There is no conflict here between the NLRA's purpose and the Act, because the NLRA expressly contemplates state right-to-work laws like West Virginia's. 29 U.S.C. § 164(b).

Similarly, in *Thomas v. Collins*, 323 U.S. 516 (1945), the Court struck down a statute requiring registration before a union could begin soliciting individuals for membership. The Court explained that the right to associate encompasses a union's right to seek members, not only its right to operate after it persuades a critical mass to unionize. *Id.* at 532; *see also NAACP v. Button*, 371 U.S. 415 (1963) (striking down a statute that forbade the NAACP from recruiting potential plaintiffs in desegregation cases). The Act does not inhibit Respondents' ability to discuss and solicit membership in West Virginia, nor does it prohibit Respondents or their members from speaking publicly in support of union membership.

In short, any collateral effects the Act may have on union membership do not rise to the level of interference with the right to associate that the Supreme Court—or any other appellate court, for that matter—has recognized before. And even if it did, recent empirical evidence undermines the circuit court's assumption that the Act will discourage union membership, *see* A.R. 45. If anything, it appears that eliminating agency fees helps union membership. From the time *Janus* was decided to December 2018, the number of Pennsylvania executive-branch employees who are members of public-sector unions *increased* by 1,055.[4] And in New York, two state-employee unions saw a total increase of 19,391 members after *Janus*.[5]

[4] Katherine Barrett & Richard Greene, *Defying Predictions, Union Membership Isn't Dropping Post-Janus*, Governing.com (Dec. 10, 2018), *available at* http://www.governing.com/topics/workforce/gov-janus-impact-union-membership.html.

[5] Jon Campbell, *Many warned a Supreme Court ruling would cripple unions, NY's remain strong*, Democrat & Chronicle (Feb. 22, 2019), *available at* https://www.democratandchronicle.com/

And although most federal-employee unions are exclusive agency unions, federal law prohibits nonmembers from being required to pay agency fees. *See* 5 U.S.C. §§ 7102, 7111(a), 7114(a). The Supreme Court found it persuasive in *Janus* that, despite this legal framework, "nearly a million federal employees . . . are union members." 138 S. Ct. at 2466 (footnote omitted). Similarly, United States Postal Service employees are mainly represented by exclusive agency unions that cannot charge nonmembers an agency fee. *See* 39 U.S.C. §§ 1203(a), 1209(c). Yet again, "about 400,000" Postal Service employees—or over 80%[6]—still choose to become union members. *Janus*, 138 S. Ct. at 2466. There thus appears to be no merit to the circuit court's speculation that "if workers can get [union] services for free, they would have no incentive to join the union or remain a member." A.R. 45.

C. Further, far from infringing on associational freedoms, the Act protects the associational rights *of employees*. Freedom of association includes the right "to . . . not associate." *Adkins v. Miller*, 187 W. Va. 774, 777, 421 S.E.2d 682, 685 (1992) (quoting *Rutan v. Repub. Party of Ill.*, 497 U.S. 62, 76 (1990)). This right not to associate includes "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 573 U.S. at 656. The Act furthers that important goal by ensuring that a union cannot use the power federal law gives it as an exclusive agency union to force employees to support the union financially or else lose their jobs. *See* 29 U.S.C. § 159(a); *see also* W. Va. Code § 21-1A-3. At the same time, the Act does not restrict the ability of employees to join a union if they so choose. Under West Virginia

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story/news/politics/albany/2019/02/22/janus-decision-new-york-unions-remain-strong-despite-blow-from-supreme-court/2851234002/.

[6] *See Number of Postal Employees Since 1926*, United States Postal Service, *available at* https://about.usps.com/who-we-are/postal-history/employees-since-1926.pdf (last visited June 18, 2019).

law, any employee wishing to "join or assist" a labor organization may do so. W. Va. Code § 21-1A-3.

The circuit court dismissed the State's interest in protecting employees from compelled association with a union through compulsory agency fees. A.R. 54-57. The court below relied mainly on precedent barring a union from requiring nonmembers to pay fees "beyond those germane to collective bargaining, contract administration, and grievance adjustment," *Commc'ns Workers*, 487 U.S. at 745—that is, it recognized the State's "legitimate and substantial interests" when it comes to barring compulsory union membership or fees related to political and ideological activities, A.R. 54, but not the corresponding interest in avoiding *any* type of forced association. The circuit court employed an impermissible double standard, and its analysis breaks down even further in light of *Janus*.

Because the "[f]reedom of association . . . plainly presupposes a freedom not to associate," *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quotation marks and citation omitted), it cannot be the case that Respondents have an associational interest in collecting agency fees, but employees have no associational interest in refusing to pay *those same fees*. In other words, if there is no associational right not to pay agency fees when it comes to employees' rights, then there is also no associational right on the part of a union to collect them—and thus Respondents lack a viable claim that the Act infringes their associational rights. The circuit court should have reached the more plausible conclusion that employees enjoy the associational freedom either to associate or not to associate through the payment of agency fees. These rights do not conflict because "[t]here cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from

remunerative employment all other persons who will not . . . participate in union assemblies" through financial support. *Lincoln Fed.*, 335 U.S. at 531.

The circuit court also rejected *Janus* too quickly—which properly understood, is a powerful counterpoint to the idea that employees' right not to associate stops short of encompassing a right not to be forced to pay agency fees. *See Janus*, 138 S. Ct. at 2466 ("the assessment of agency fees" is a "restricti[on] of associational freedoms" (citing *Harris*, 573 U.S. at 649)). The circuit court dismissed *Janus* because it addressed only public-employee unions. A.R. 68-70. But in the only case the circuit court cited, *Carter v. Transportation Workers Union of America Local 556*, 353 F. Supp. 3d 556 (N.D. Tex. 2019), the plaintiff "assert[ed] causes of action for retaliation by her employer and religious discrimination under Title VII." *Id.* at 576. The court noted that although the plaintiff also "object[ed] to paying her union dues, that is not the claim [she] brought before the [c]ourt." *Id.* The Northern District of Texas's decision, therefore, does not support the circuit court's assertion that *Janus* has no resonance here. To the contrary, there is no reason to conclude that *Janus*'s rationale that forced agency fees restrict "associational freedoms," 138 S. Ct. at 2466, applies to public employees only. The only court of last resort to address its applicability in the right-to-work context held that its analysis carries weight in the private sector as well. *Zuckerman*, 565 S.W.3d at 601-02. There is no meaningful difference between the rights of employees in either context that diminishes *Janus*'s persuasive force.

Finally, this analysis confirms that nothing in the West Virginia Constitution calls for a different response than the result under federal law. The circuit court noted that the freedom of association guaranteed by the West Virginia Constitution is broader than the First Amendment's related protections, A.R. 43-44, but it did not explain what unique aspect of West Virginia's associational right it found violated here. Nor could it: The case the circuit court cited, *Pushinsky*,

164 W. Va. at 745, 266 S.E.2d at 449, addressed an *individual's* right to freedom of association, not an organization's rights. *Id.* Because the Act takes a broad view of individual associational rights—which include the right both to associate and not to associate—*Pushinsky* is more plausibly read to require the Act than to bar it. And of course, when this Court took up this case two years ago it did not suggest that lack of precedent supporting Respondents' position was irrelevant because the West Virginia Constitution somehow leads to a different outcome than the federal Constitution and the laws of the over two dozen other States that have enacted similar right-to-work regimes. Instead, this Court found the absence of federal and state case law in Respondents' favor dispositive. *See Morrisey*, 239 W. Va. at 641, 804 S.E.2d at 891.

II. The Act Does Not Constitute An Unlawful Taking.

The West Virginia Constitution provides that "[p]rivate property shall not be taken or damaged for public use, without just compensation." W. Va. Const. art. III, § 9. Because the Act does not take or infringe any cognizable property interest, the circuit court also erred in finding that the Act violates the Takings Clause.

A. Respondents cannot claim a property interest in the only matter regulated by state law—expectation in fees that nonmembers might be forced to pay in any collective bargaining agreements entered into after the Act's effective date. This Court's 2017 decision reversing the circuit court's preliminary injunction was the first time the Court defined "property" for purposes of a Takings Cause claim. The Court held that "[a] property interest includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." *Morrisey*, 239 W. Va. at 641, 804 S.E.2d at 891 (quotation marks and citation omitted). Critically, this Court further explained that "[a] property interest . . . must derive from

private contract or state law, and *must be more than a unilateral expectation*." *Id.* (citations and alterations omitted; emphasis in original). None of these requirements are satisfied here.

Most importantly, this Court has already recognized that Respondents "have no protected property right that the Legislature has taken through the adoption of Senate Bill 1." *Morrisey*, 239 W. Va. at 642, 804 S.E.2d at 892. The Court emphasized that the Act "does not affect existing contracts." *Id.*; *see also* W. Va. Code § 21-5G-7(b). Instead, because "it affects only future agreements that unions and employers have not yet negotiated or accepted," Respondents failed to identify a legitimate claim of entitlement under an existing contract that the Act could be said to "take." *Morrisey*, 239 W. Va. at 642, 804 S.E.2d at 892. The circuit court ignored this Court's holding, but nothing has changed since the Court analyzed this same question two years ago.

As for any future contracts, Respondents' expectation of future agency fees is both "speculat[ive]" and unilateral. *Morrisey*, 239 W. Va. at 641, 804 S.E.2d at 891. For contracts entered into after the Act's effective date, "[t]he formation of a collective bargaining agreement with a fee-collection provision [is] contingent upon the consent of a third party: the employer. Hence, in the absence of an actual collective bargaining agreement, [Respondents] have only a unilateral expectation that they will receive fees from nonunion employees." *Id.* Respondents may desire to enter future contracts with agency shop provisions, but that unilateral expectation is not enough to establish a valid "property interest." *Id*.

Nor do Respondents have a legitimate claim of entitlement under federal or state law, which contemplate statutes that—like this one—prohibit unions from charging agency fees to nonmembers. The Supreme Court has explained in the public-sector context that "unions have no constitutional entitlement to the fees of nonmember-employees." *Knox*, 567 U.S. at 313 (quoting *Davenport*, 551 U.S. at 185). Consistent with that constitutional holding, federal law expressly

provides that a State may choose whether to permit agreements that charge agency fees to nonmembers. 29 U.S.C. § 164(b); *see also Sweeney*, 767 F.3d at 661 (under federal law, membership "should . . . extend to . . . fees"). As for state law, West Virginia merely permitted agency fee agreements before the Act. Now, the State has chosen to exercise the explicit authority that federal law reserves to the States in this arena—just like over two dozen other States. In short, this Court's prior decision leaves no doubt that the Act does not infringe any property interest cognizable under Article III, § 9 of the West Virginia Constitution.

B. The circuit court did not even try to reconcile its reasoning with this Court's discussion of what constitutes a valid property interest in the context of this very Act. Instead, it rehashed the analysis the Court already rejected that the costs Respondents incur under *federal* law by choosing exclusive bargaining status constitute a taking under West Virginia law. A.R. 35. According to the circuit court, the Act "takes" Respondents' property—expenditures on goods and services that federal law requires of exclusive agency unions—and "gives" it to nonmembers in the form of free services. *See* A.R. 47. Yet even if the Court were to revisit its direct holding about the nature of property interests in Takings Clause claims, the circuit court's approach would still fail.

First, the circuit court erred in concluding that the Act requires unions to provide services to nonmembers. A.R. 47. The duty of fair representation is entirely a creature of federal law, which Respondents do not challenge. A cursory reading of the Act shows no such obligation, nor is the duty found in other parts of state law, either. And even if West Virginia law imposed a duty of fair representation, Respondents do not challenge that duty, nor would removing it relieve Respondents of the need to comply with the same obligation under federal law.

The appellate courts that have considered this issue have unanimously rejected the circuit court's reasoning. "Because it is *federal* law that provides a duty of fair representation," a *state*

right-to-work statute "does not 'take' property." *Zoeller*, 19 N.E.3d at 753 (quoting *Sweeney*, 767 F.3d at 666) (emphasis in original); *see also Int'l Union of Operating Eng'rs Local 370 v. Wasden*, 217 F. Supp. 3d 1209, 1223 (D. Idaho 2016) (rejecting an almost identical challenge to Idaho's right-to-work statute). If Respondents believe that their property has been taken under federal law, they may seek compensation from the federal government or—absent compensation—invalidation of the federal duty. They have not taken this route, and for good reason: Respondents recognize the value of operating as exclusive agency unions and enjoy the benefits that status provides.

The circuit court did not rely on a single case for its conclusion that the remedy for an alleged taking under the federal duty of fair representation is to invalidate a state law that prevents employees from being forced to support a union. Far from supporting the circuit court's approach, the decisions it cited show that the proper remedy for a taking is compensation from the government that has worked the taking. When the State required lawyers to provide excessive legal services without compensation, for example, the solution was not to permit them to extract fees from a third party or challenge another law that might limit their revenue. The same government that required the lawyers to provide services was required to compensate them, or else stop requiring those services in the first place. *See Jewell v. Maynard*, 181 W. Va. 571, 582, 383 S.E.2d 536, 547 (1989); *see also State ex rel. Partain v. Oakley*, 159 W. Va. 805, 822, 227 S.E.2d 314, 323 (1976). Further, these cases do not stand for the broad proposition that Article III, § 9 bars Respondents from "be[ing] forced to expend their services and resources on behalf of individuals who do not pay for them." A.R. 52. *Jewell*, for instance, explicitly rejected the argument that appointment of attorneys to represent indigent clients is an unconstitutional taking "even for no pay at all"—at least absent a further showing that the appointment would undermine

a firm's or solo practitioner's ability to operate. 181 W. Va. at 581, 383 S.E.2d at 546. Respondents made no similar showing that any "taking" here would pass that threshold.

Second, the Act does not compel Respondents to provide services to nonmembers because they voluntarily accept that burden in exchange for the benefits that come with exclusivity. Under federal law, Respondents are free to decide whether to employ an exclusive agency or members-only union model, *see Zoeller*, 19 N.E.3d at 753—and the duty to fairly represent nonmembers applies *only* if they choose the former, *see Int'l Ass'n of Machinists*, 367 U.S. at 760–61. The State does not require Respondents to expend any resources because it does not require Respondents to operate as exclusive agency unions—indeed, not even the federal government requires unions to expend resources on nonmembers. Rather, the Act provides employees with the right to decline union membership and refuse to pay to support union activities, but this is a known possible cost of exclusive agency unions that has existed as part and parcel of federal law since at least 1947. *See* Taft-Hartley Act, ch. 120, § 14(b), 61 Stat. 151 (1947).

This Court has explained that a party may not choose to participate in a regulatory program and then complain that the program has taken property from them. In *State ex rel. Lambert v. County Commission of Boone County*, 192 W. Va. 448, 452 S.E.2d 906 (1994), employers who chose to participate in the Public Employees Retirement System ("PERS") argued that a statute forcing them to make payments to the Public Employees Insurance Agency to cover the costs associated with retired employees took their property without just compensation. This Court rejected that argument and held that "fundamentally" the payments "cannot be considered as imposing a taking since it is the employer's decision to participate in PERS which activates the imposition of a fee on the employer for health benefits for retired employees." *Id.* at 459, 452 S.E.2d at 917. So too here: Respondents cannot choose to form as exclusive agency unions under

federal law and then complain that the obligation to fairly represent nonmembers under that regime is a taking. And Respondents have even less grounds to cry foul where half the country enacted right-to-work laws before West Virginia: After all, it could hardly come as a shock that the scenario envisioned under federal labor law of exclusive bargaining status without compulsory agency fees would become a reality in this State, too. *Cf. Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645-46 (1993) (concluding that pension plans, which have "long been subject to federal regulation," do not suffer a taking when a legislative ceiling on liability is lifted, "there being no reasonable basis to expect that the legislative ceiling would never be lifted").

Third, even if Respondents possess a legitimate property interest in future agency fees *and* that interest were somehow found to have been taken by the State, Respondents' claim would still fail because they have received just compensation. The Supreme Court of Kentucky, for instance, rejected a similar takings argument just last year. The court rejected the analogy to "a case arising out of an attorney being required to represent an indigent criminal defendant[] in support of [the] argument that a requirement to provide a valuable service without compensation constitutes an unconstitutional taking," in part because the union's representation of a nonmember in a grievance proceeding benefits all union members by setting favorable precedent for the future. *Zuckerman*, 565 S.W.3d at 602-03.

More importantly, a union that chooses to serve as an exclusive agent receives substantial benefits under federal law. For example, an exclusive agency union receives the power to act as the sole negotiator for the bargaining unit and to exclude dissenting employees. 29 U.S.C. § 159(a). And employers must negotiate in good faith with an exclusive agency union. *Id.* § 158(a)(5). These benefits "fully and adequately compensate[]" Respondents for any

expenditures required to meet the duty of fair representation they assume under federal law. *Sweeney*, 767 F.3d at 666; *see also Zuckerman*, 565 S.W.3d at 602-03; *Zoeller*, 19 N.E.3d at 753; *Int'l Union of Operating Engineers*, 217 F. Supp. 3d at 1223; *cf. Int'l Assoc. of Machinists*, 903 N.W.2d at 150 (stating that unions must weigh the costs and benefits of becoming (or remaining) an exclusive agency union when discussing the unions' takings claim).

The circuit court tacitly concedes these benefits of exclusive agency status by reasoning that unions effectively have no choice between organizing as an exclusive agency shop or a members-only union because the benefits of exclusive status under federal law are too alluring. A.R. 61 (citation omitted). Yet if that is truly the case, then there is no reason to reject those same benefits out of hand when it comes to just compensation. The better conclusion is that Respondents are sophisticated actors, and their decision to retain exclusive bargaining status after the Act went into effect shows the substantial benefits they enjoy outweigh the corresponding costs. And this analysis applies with even greater force where the only countervailing "hard evidence," A.R. 61, was speculative research about theoretical decreases in union membership from a third-party report borrowed from the Legislature's deliberations that was neither independently verified nor specifically tied to *these* Respondents. A.R. 586-87. Respondents have suffered no taking, and the circuit court accordingly erred by enjoining the Act on that basis.

III. The Act Does Not Infringe On A Constitutionally Protected Liberty Interest.

Contrary to the circuit court's conclusion, the Act does not violate the liberty interest protected by the Due Process Clause of the West Virginia Constitution. Our Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. Const. art. III, § 10; *see also id.* § 3. As applied to "matters of economic legislation" like the Act, a successful due-process challenge must overcome the

"considerable deference" afforded to the Legislature when passing on the constitutionality of a duly enacted law. Syl. pt. 3, *Gibson*, 185 W.Va. 214, 406 S.E.2d 440. The exact rationale the Legislature relied on is irrelevant—the operative question is whether a non-arbitrary basis supports the challenged law. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). And the burden rests "on [the] one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W.Va. 129, 145, 602 S.E.2d 805, 821 (2004) (quotation marks and citation omitted). Respondents cannot satisfy that high burden here, and the circuit court erred in concluding otherwise.

The circuit court's decision on this count rests on the same incorrect premises discussed above. The court held that the Act infringes on Respondents' liberty interests because it requires them to expend labor for nonmembers. *See* A.R. 50-51. But again, the Act does no such thing: The duty of fair representation arises under federal law, and even then only if a union makes a voluntary choice to organize as an exclusive agent instead of a members-only union.

Further, the State indisputably has power to pass laws like the Act "to promote the general welfare" of its citizens. Syl. pt. 4, *Hartley Hill Hunt Club v. Cty. Comm'n of Ritchie Cty.*, 220 W. Va. 382, 647 S.E.2d 818 (2007) (citing Syl. pt. 5, *Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965)). While Respondents may wish that they had the legal right to charge agency fees to nonmembers, the imposition of reasonable regulations on commercial activity is well within the State's police power. *See* Syl. pt. 1, *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960); *see also* Syl. pt. 2, *W. Va. Nonintoxicating Beer Com'r v. A & H Tavern*, 181 W. Va. 364, 382 S.E.2d 558 (1989) (citation omitted). The cases the circuit court relied on to support its contrary holding, *see* A.R. 50, are readily distinguishable.

In *Ex Parte Hudgins*, 86 W. Va. 526, 103 S.E. 327 (1920), this Court struck down a statute requiring all nonstudent, able-bodied males between the ages of 16 and 60 to work at least 36 hours per week. *Hudgins*, however, was decided during the era of *Lochner v. New York*, 198 U.S. 45 (1905)—and the Court has long since "abandoned" *Lochner*'s "intrusive approach." *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W. Va. 538, 542, 328 S.E.2d 144, 149 (1984). Today, "courts rarely overturn legislation regarding economic matters on the ground that substantive due process has somehow been violated." *Id.* *Hudgins* is also factually distinguishable: Making it a crime for a large swath of the population not to work or attend school on an almost full-time basis is hardly on the same plane as prohibiting mandatory union fees even where a union assumes a duty under federal law to represent nonmembers. The same is true of *Bailey v. Alabama*, 219 U.S. 219 (1911)—the circuit court's invocation of a statute that "operated to create a peonage system in violation of the 13th Amendment," A.R. 50, shows the extreme nature of economic statutes that are, in fact, arbitrary or irrational.

And *Thorne v. Roush*, 164 W. Va. 165, 261 S.E.2d 72 (1979) supports the State's due-process argument. To be sure, the Court struck down a statute requiring barbers to undergo a one-year apprenticeship, but it also recognized that apprenticeships "might very well be a rational legislative choice." *Id.* at 169, 261 S.E.2d at 75. The problem was how the Legislature adopted this policy, or "the lack of any standard against which competence acquired as an apprentice may be measured," *id.*, not the policy itself. There are no similar process failures here. There is also a clear and rational relationship between the State's interests in protecting employees from compulsory association and financial expense and how the Act achieves those interests.

Unlike these cases, the Supreme Court of the United States rejected a due process claim brought by trade unions under the Fourteenth Amendment's Due Process Clause. *Lincoln Fed.*,

335 U.S. at 533-36. The circuit court did not explain why West Virginia's due process guarantees should be interpreted any differently. Although this Court has left open the possibility of interpreting Article III, § 10's due process guarantee broader than the Fourteenth Amendment, *see State ex rel. Harris v. Calendine*, 160 W. Va. 172, 180 n.3, 233 S.E.2d 318, 324 n.3 (1977) (citations omitted), the cases above make clear that there is no need to reach that question here because the Act is rational under any test.

Specifically, the Act is rationally related to a legitimate government interest because it recognizes the associational freedom of employees to choose whether to participate in or decline to participate in all union activities, including the payment of agency fees. W. Va. Code § 21-1A-3. The State has a legitimate interest in protecting workers' ability to secure employment free from compelled subsidization of activities with which they disagree. And this legislative judgment is not unique: almost 30 other States have similar protections for nonmember employees.[7] Federal law also recognizes the legitimacy of the interests legislation like the Act serve by authorizing States to enact right-to-work laws consistent with the broader federal labor-law regime. 29 U.S.C. § 164(b). And by invalidating agreements containing mandatory agency fees, the Act is more than rationally related to achieving these interests.

The Legislature also could have reasonably concluded that relations between employers, employees, and unions would be better if a dissenting employee could not be compelled to pay fees or lose his or her job. The Act rationally promotes that goal as well by barring agreements that require agency fees even for dissenting employees. *See* W. Va. Code § 21-5G-3. Similarly, the Legislature could have concluded that the Act was reasonably related to economic growth and

[7] *See Right to Work States*, Nat'l Right to Work Legal Def. Found., https://www.nrtw.org/right-to-work-states (last visited June 18, 2019).

development in the State. Indeed, the Legislature commissioned a report that showed right-to-work laws contributed to higher long-run rates of employment growth and gross domestic product growth. A.R. 660. The Seventh Circuit and Supreme Court of Kentucky concluded that this purpose passes muster under rational basis review. *Sweeney*, 767 F.3d at 670–71; *Zuckerman*, 565 S.W.3d at 600. This Court should too.

IV. The Circuit Court's Decision Conflicts With Federal Labor Law.

As discussed above, there is no basis for the circuit court's renewed insistence on being the first court to invalidate a state right-to-work statute on constitutional grounds. That said, if this Court determines that the Act violates the West Virginia Constitution, that portion of state law would create significant tension with federal labor law.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land"—anything "in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "Congress may consequently pre-empt, *i.e.*, invalidate, a state law," including a constitutional provision, "through federal legislation." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015). As relevant here, "[c]onflict pre-emption exists where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotation marks and citation omitted); *see also Adams v. Pa. Higher Educ. Assistance Agency*, 237 W. Va. 312, 318, 787 S.E.2d 583, 589 (2016) ("A state law may pose an obstacle to federal purposes by interfering with the accomplishment of Congress's actual objectives, or by interfering with the methods that Congress selected for meeting those legislative goals." (quoting Syl. pt. 7, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (2009))).

Under the NLRA, unions that organize as exclusive agency unions have a duty of fair representation. *See Janus*, 138 S. Ct. at 2467. As explained above, this duty includes a nondiscrimination requirement toward nonmembers when it comes to grievances, contract negotiations, and other matters. *See id.* Further, although federal law generally allows unions and employers to enter into contracts requiring nonmembers to pay agency fees, 29 U.S.C. § 158(a)(3), it also specifically permits States to enact right-to-work statutes forbidding these same arrangements, *id.* § 164(b). Taken together, these two provisions show Congress's clear intent that States have a choice whether to allow collective bargaining agreements that contain mandatory agency-fee provisions. In the Act, the Legislature took Congress at its word and acted on this reserved policy judgment. The circuit court's interpretation of West Virginia law, however, would erase that choice.

The Supreme Court of the United States has struck down state laws that conflict with or obstruct comprehensive federal regimes in a manner even less direct than the significant tension the circuit court created here. Federal law prohibits manufacturers of generic drugs from altering the drug's composition or the contents of their labels, for example, where that alteration departs from what the federal Food and Drug Administration has approved. 21 C.F.R. §§ 314.70(b)(2)(i), 314.94(a)(8)(iii), 314.150(b)(1). New Hampshire had no quarrel with these federal requirements, but passed a law that mandated *additional* warnings on certain drugs. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 493 (2013). Yet even though the federal and state regimes could operate simultaneously, the Court struck down that state regime because it imposed a duty that was inconsistent with federal law. *Id.*

This Court's decision in *Morgan* is similarly instructive. In *Morgan*, the plaintiff filed a products liability lawsuit alleging that a car's side-window glass was defectively designed. A

federally promulgated rule, however, "permits the manufacturer to make a choice between available safety options for side-window glass." *Morgan*, 224 W. Va. at 79, 680 S.E.2d at 94. This Court held that this rule preempted the plaintiff's common-law negligence claim. This Court explained that permitting the common law suit "would foreclose choosing one of those options" that federal law intentionally left open. *Id.* The same is true here, where federal law provides a choice to allow mandatory agency fees—or not. The circuit court's order conflicts with that federal framework.

* * *

The last time this Court heard this case it emphasized in a syllabus point that a "[c]ourt does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation." Syl. pt., *Morrisey*, 239 W. Va. 633, 804 S.E.2d 883 (quotation marks and citation omitted). The West Virginia Legislature made a policy judgment that the Act serves the public interest; the courts' duty is to enforce that "legislation unless it runs afoul of the State or Federal Constitutions." *Id.* (quotation marks and citation omitted). This Court held two years ago that Respondents had not shown even a likelihood of success on their constitutional claims. The circuit court refused to take this Court seriously, but the law has not changed since. Now, it is time to bring this case to a final resolution and confirm that the Workplace Freedom Act stands on solid constitutional ground.

CONCLUSION

For all these reasons, the State respectfully requests that this Court reverse the circuit court's order and remand with instructions to enter judgment in favor of the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on June 19, 2019, a true and correct copy of the foregoing document was served upon the following via e-mail and first-class mail addressed as follows:

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